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4th Annual Antitrust in the Financial Sector Hot Issues & Global Perspectives Conference: Consumer Data Protection & Competition in Banking

Webinar - 15 September 2020*

Webinar organised as part of the #AntitrustInTheFinancialSector Webinars Series by Concurrences.

Panel Discussion

Moderator, Andrew Finch (Paul Weiss), introduced the panelists and gave each speaker a chance to comment on the intersection of consumer data protection and competition policy.

Maria Velentza (EU Commission) provided her insight of data protection and competition law from a European standpoint, specifically in the financial services sector. She observed that data has become an essential input for many activities in the financial services sector and described two pieces of legislation from the European Union that are important in relation to the use of data: (1) General Data Protection Regulation (GDPR), which applies across different sectors; and (2) Payment Services Directive II (PSD2). Both pieces of legislation are built on the principle of an individual's autonomy over the use of one's data. The GDPR requires informed consent from platform users and the right to data portability (transmission of one's data to another controller). The PSD2 enables third-party provider access to a specific set of the consumer's data and for a specific purpose. In the EU, requests to access data are only granted if a number of strict conditions are fulfilled. The two main conditions are that the data is indispensable to compete in a particular market (quasi-essential facility), and the request is proportionate.

> **"WHAT IS CLEAR NEVERTHELESS IS THAT COMPETITION POLICY AND CONSUMER DATA PROTECTION DO NOT CONTRADICT EACH OTHER. WE CONSIDER THAT THEY RATHER COMPLEMENT EACH OTHER."**
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> **MARIA VELENTZA**

Ms. Velentza explained that within the financial services sector, there are currently two big data access issues. The first relates to the asymmetric data access existing under PSD2 whereby Big Techs may request banks for access to consumer account information, whereas banks do not have mandated access to user data held by Big Techs. The second issue relates to potential cross-sector data exchanges. Ms. Velentza explained that European banks are

asking EU regulators to create a legal framework that would facilitate data exchanges across sectors, including the transfer of consumer data from Big Techs to banks. She informed that EU regulators may consider such demands so long as the cross-sector data exchanges are based on consumer consent. However, before trying to fix the asymmetry, regulators must assess the risk in providing banks with reciprocal access to prevent creating new asymmetries. She also stated that banks would need to demonstrate how they are excluded from competing in a specific market by not having access to particular data. She noted that regulators would need to know the type of data involved in the access request and whether it is, for example, covered by intellectual property rights, and what it will ultimately be used for. Nevertheless, she added that it is clear that competition policy and consumer data protection do not contradict each other, but rather complement each other.

"DEFINITELY, COMPETITION NEEDS TO TAKE PLACE ON THE MERITS, A LEVEL PLAYING FIELD NEEDS TO BE MAINTAINED, AND THE BENEFITS OF INNOVATION BROUGHT ABOUT THROUGH DIGITIZATION NEED TO REACH CONSUMERS."

MARIA VELENTZA

Mr. Finch, then, asked Ms. Velentza her thoughts on striking the right balance between the EU's approach regarding the interplay between consumer data protection and competition compared to that of the United States. Ms. Velentza replied that the consumer data protection and competition complement each other because they have an overarching objective to ensure consumers with the benefit of using data-based digitized platforms without having to forego their fundamental data rights. She observed that violations of the data protection standard are starting to become used as a benchmark for assessing competition. For example, the German Federal Cartel Office in 2019 considered data protection regulations to assess competitive effects of Facebook's processing of users' data. The agency examined Facebook's terms of service, the manner and extent to which it collects and uses data, and found the company to be in violation of European data protection laws. The German enforcers also found Facebook's practice of unrestricted collection of user data from different data sources, and combining and assigning them to an account without users' consent as an exploitative abuse under competition law. In June, Germany's highest court (Federal Court of Justice) found Facebook liable for abusing its dominance in social media by illegally harvesting its users' data. This was the first time that a competition authority in the European Union relied on a theory to comply with data protection laws to establish a violation of competition law.

Next, Joel Mitnick (Cadwalader, Wickersham & Taft) distinguished between the overall U.S. approach to consumer data privacy and competition and the EU's approach. He explained that the U.S. does not have the legislative background that Europe has, and frequently relies on other statutes to fill the gap. In the U.S., the principal financial sector privacy protection statute is the Gramm-Leach-Bliley Act, which is principally a disclosure statute. The statute requires banks and other financial entities that collect personal financial information to issue annual privacy notices in which they disclose what their privacy policies are, and in particular, how they propose to share information with their various marketing partners, and consumers can opt in or opt out. It puts the onus on the consumers to be aware of changes in an institution's privacy policies. However, he observed that consumers do not really pay attention to whether they can opt in or out of it as evidenced by banks partnering with online advertising specialists, who collect and provide consumer spending habits from the very debit statement that the bank issues to the consumers to target ads.

Mr. Mitnick explained that U.S. law enforcement agencies are turning to antitrust laws to address privacy issues related to Big Data due to the lack of privacy tools – other than penalties for breaches that result in hacking – to adequately deal with the privacy issues. However, he disagreed with this approach and thought it would be wiser to develop robust privacy rules and a privacy environment rather than borrowing from the body of competition law.

"FOCUS MORE ON DEVELOPING ROBUST PRIVACY RULES AND A PRIVACY ENVIRONMENT RATHER THAN BORROW FROM THE BODY OF COMPETITION LAW."

JOEL MITNICK

He informed that the U.S. Supreme Court does not recognize the essential facilities doctrine, which implies that any antitrust claim of data as an essential facility would likely fail at the highest court, even though some lower courts have recognized the doctrine. Mr. Mitnick also mentioned that an area where

competition and privacy may potentially come up is if firms are using privacy as a factor of competition as a way to distinguish themselves from their competitors.

> **"THE ABUSE OF DOMINANCE IN EUROPE IS A VERY POWERFUL TOOL, AND IT MAY BE ALSO DANGEROUS...MAYBE IT IS NOT A GOOD THING TO INTRODUCE ABUSE OF DOMINANCE LIKE THE EUROPEAN ABUSE OF DOMINANCE ALSO INTO NEW YORK STATE LEGISLATION."**
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> **FABRIZIO DI BENEDETTO**

Finally, Fabrizio Di Benedetto (Banca Intesa Sanpaolo) stated that competition law recognizes information exchange as a common feature of competitive markets and that it may have procompetitive effects, such as reducing information asymmetry. The Horizontal Guidelines of the European Commission recognizes that exchange of information may directly benefit consumers because it can reduce search costs and improve their choice, particularly in the banking sector as demonstrated in the Asnef-Equifax case in 2006. For Mr. Di Benedetto, the main competition concern is when a firm prevents access to data that can be procompetitive and the firm abuses its dominance. However, where traditional antitrust measures are insufficient to address this issue, new regulations may fix the competitive gap. For example, PSD2 at the EU level allows third parties to access consumers' current account information and leaves room for innovation. Mr. Di Benedetto also explained two recent initiatives by the European Commission to regulate data in digital markets – Digital Services Act and the New Competition Tool (NCT). The purpose of the former is to set ex ante rules to ensure that markets characterized by large platforms with significant network effects, remain fair and contestable for innovation and allow for market entry. The NCT is meant to address gaps in the current EU competition rules, which do not effectively consider monopolization strategies by non-dominant players. He implied that the NCT may be a better tool to tackle issues that came up in the European Commission's Apple Pay case from last June.

Mr. Finch then asked each panelist to share their thoughts on the risks of over regulation too early. Mr. Di Benedetto replied that he did not see too many risks and pointed to PSD2 fostering innovation in retail banking to support his beliefs. Ms. Velentza commented that the regulation must be appropriate, since the European Commission must also consider international businesses. She stressed that the best way to deal with this issue is by encouraging correspondence and collaboration among competition authorities and regulators. The EU Commission has open communication channels with supervisory and regulatory authorities, including banking and financial services to ensure that the proposed policy approaches in their respective areas are compatible with one another and to incentivize innovation. The authorities also monitor developments in areas that they coordinate in. She mentioned the Facebook Libra project as an example where a variety of institutional stakeholders weighed the costs and benefits of the project across the sectors. Mr. Mitnick raised concerns that the government's tool to stop mergers may inhibit innovation. Though Mr. Mitnick acknowledged that Congress has neglected to legislate on data protection, he cautioned against legislative changes coming from outside of Congress. He stated that if Congress sets ground rules to level the playing field, firms will find ways to innovate.

Questions & Answers

One attendee asked whether a dominant firm that amends its privacy policy to say that it will be collecting more data would abuse its dominant position. Ms. Velentza answered that collection of data by itself would not be considered an abuse of dominant position but it may be a concern for violating other rules, such as intellectual property rights. She stated that the key question is how the data will ultimately be used. Mr. Mitnick replied that one would need to discern whether it is a privacy harm or a competition harm. He suggested that under U.S. law, if the firm is seeking more data and exposes consumers to some injury then it would be a privacy concern, but if by possessing more data the firm will be able to exclude its rivals and foreclose entry, then it would be a potential antitrust or competition concern. Mr. Di Benedetto added that in European abuse of dominance cases there is a so-called "special responsibility" of the dominant player, which in theory, could also lead to an abuse of dominance case even when the dominant player complies with all other laws. However, he noted that the Commission seldom finds abuse of dominance and when it does, it frequently ends with commitments of undertakings.

Mr. Mitnick followed up on an earlier point made by Mr. Di Benedetto about the NCT and his description of a non-dominant firm that would have market power. Mr. Mitnick asked the other two panelists to clarify whether under the NCT, non-dominant firms may be scrutinized by the abuse of dominance standards. Mr. Di Benedetto replied that the NCT would be an extension of abuse of dominance and that it would be a tool for moral suasion designed specifically for digital markets. He pointed out that even if a firm is not dominant, it might still be an unavoidable trading

partner for banks, such as Apple Pay and Google Pay. Therefore, he believes that it could be useful to have a "soft" tool to prevent tentative monopolization by non-dominant players who are becoming gatekeepers in certain sectors. Ms. Velentza commented that she, personally, does not see it as an extension, but rather a reshaping of the concept of dominance. She explained that if agencies cannot establish dominance in the modern digital economy on the basis of traditional theories of harm, then perhaps, we should rethink our rationale of dominance to adapt to changing times.